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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-690

CHARLES W. ANDERSON and ANITA ANDERSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Charles W. Anderson and Anita Anderson petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on September 23, 1971.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 447 F. 2d 833. It is reprinted as Appendix 1, annexed hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Eighth Circuit was entered on August 30, 1971 (App. 1). On September 23, 1971, the Court of Appeals denied a Petition for Rehearing (App. 2). On October 16, 1971, this Court, Mr. Justice Harry A. Blackmun, entered an Order granting petitioners an extension of time until November 22, 1971, within which to file a Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231.

QUESTION PRESENTED

The question presented is:

Where the Court of Appeals reversed petitioners' convictions on nine counts of an indictment by finding that such convictions were based on evidence violative of their sixth amendment rights to confrontation; was it also a violation of petitioners' sixth amendment rights for the Court of Appeals to affirm petitioners' convictions on the remaining two counts of the indictment where (1) such convictions were also based to a significant extent, if not completely on that same inadmissible evidence, (2) where the court below failed to inquire, as required by prior decisions of this Court, into whether the constitutionally inadmissible evidence might have contributed to the jury's convictions on the two counts which were affirmed, and (3) where, in fact, there was no evidence, other than that which was inadmissible, to support an essential element of the crime charged?

STATEMENT OF THE CASE

Petitioners Charles W. Anderson and Anita Anderson are husband and wife, and 64 years of age. On December 17, 1969, they were indicted by a Federal Grand Jury for the Eastern District of Missouri, which indictment, in twelve counts, alleged that they had used the mails pursuant to a scheme to defraud in violation of 28 U. S. C. § 1341.[1] Prior to this indictment, neither petitioner had a criminal record, and for many years they had engaged in business activities in the St. Louis, Missouri area through two wholly owned corporations.[2]

At trial the Government dismissed Count I for lack of any evidence that the mails were used, and the jury returned a guilty verdict on Counts II through XII. Petitioners were each sentenced to five years in prison on each of Counts II through VI, which sentences were to run *consecutively,* thus totaling 25 years; they were also sentenced to five years in prison on each of Counts VII through XII, but these were made to run concurrently with the sentences under Counts II through VI. On appeal, the Eighth Circuit reversed the convictions as to Counts IV through XII but affirmed the convictions on Counts II and III, thereby leaving each petitioner facing a ten year prison sentence despite their ages, their lack of any criminal records, and despite the fact that only one scheme to defraud had been charged under a statute providing a maximum sentence of five years.

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[1] The indictment is reprinted as Appendix 3, annexed hereto.

[2] These corporations were Real Estate Loan & Investment Co. and Charles W. Anderson, Inc.

Prior to the inception of this case, petitioners, through their two corporations, had engaged *inter alia* in the business of buying and selling, or arranging for others to buy and sell, notes or interests in notes and other debt instruments. Because of adverse economic conditions, a number of the makers of such notes, which had been bought or sold through petitioners' corporations, failed to pay the amounts due thereon. While petitioners, through their corporations, attempted to pay interest on the notes, this, among other things, proved to be a drain on their resources resulting in the corporations becoming bankrupted and left without funds available to pay their debts. Bankruptcy proceedings were in fact instituted.

Of all the many transactions engaged in by petitioners' corporations over the years, only certain ones were brought into this case by the Government. As of the time of the bankruptcy, petitioners' corporations had sold certain notes to investors, each of which notes was secured by some one of six separate real estate properties, one of which properties was known as 800 Coach 'N Six Court in St. Louis, Missouri. As of the time of the bankruptcy, these notes, secured by those six properties, had not been paid, although some interest thereon had been paid. Petitioners were indicted for allegedly violating 28 U.S.C. § 1341 (use of mails pursuant to a scheme to defraud) in connection with the sale of the notes secured by those six properties.

The indictment charged that petitioners, through their corporations, engaged over a period of years in a scheme to defraud purchasers of notes by intentionally overstating to them the value of the real estate properties securing the notes and by understating the

amount of the encumbrances on those properties. In this regard, the indictment charged that the encumbrances on those six properties were in fact "far in excess" of the value of those properties [App. 3, p. 14a), and this was the crux of the Government's case. The indictment contained twelve counts, with Count I detailing the allegations concerning the alleged scheme to defraud. Each of the twelve counts identified a particular mailing allegedly made pursuant to the one overall scheme to defraud, with each of the last eleven counts merely incorporating by reference the allegations contained in Count I concerning the alleged overall scheme.

As the Court of Appeals held, it was incumbent upon the Government to prove the fair market value of each of those six properties in order, in turn, to prove that the encumbrances thereon were "far in excess of the actual cash value" of each of the properties as alleged in the indictment. Such evidence of value therefore was a basic and essential element of the Government's case.

In an attempt to prove this essential element of the alleged crime, namely the value of each of the six properties, the Government, over strenuous objection, offered the testimony of the chief appraiser in the Assessment Division of the St. Louis County Department of Revenue. Although this official had not personally appraised any of the properties, he was nevertheless allowed to testify as to the value of each of the six properties as determined solely for tax purposes; his testimony was based on records prepared by others, but those records were not offered into evidence, nor were the persons who prepared the records presented as witnesses. Since this tax purpose valua-

tion for each of the six properties was far less than the encumbrances on the properties, the jury, as the Government urged, could have inferred from the disparity between those two figures that petitioners did in fact have an intent to defraud when they sold notes secured by those properties. The assessor's testimony as to value was presented to prove the alleged scheme to defraud which was incorporated into each specific count alleging a different mailing.

Aside from the assessor's testimony, there was no other evidence as to the value of these six properties. This evidence, however, was clearly inadmissible and violative of the sixth amendment as the Eighth Circuit acknowledged (App. 1, p. 7a):

> * * * This [*i. e.* inadmissibility of property valuations by tax assessors to establish market value in condemnation cases] would be even more true in a criminal case where, as here, the testimony was given by a person who had not actually appraised the property in question. *Thus depriving the defendants of their sixth amendment right to be confronted with the witnesses against them.*
>
> It is our conclusion that this evidence was inadmissible, and therefore not proof of the allegation of each of the eleven counts, that the market value of each of the six properties was far less than the outstanding deeds of trust. *Since this was an essential element* of the alleged scheme to defraud, the motion for judgment of acquittal made at the close of all the evidence should have been sustained as to all counts as to which this was the only evidence of value. (Emphasis added)

In the above noted respect the Eighth Circuit was correct; however, it erred when it affirmed petitioners' convictions on Counts II and III on the sole ground

that there was "other" evidence (in addition to the assessor's testimony) which was "adequate" to show the value of the particular property (800 Coach 'N Six Court) which the Court of Appeals found to be involved in those two Counts (App. 1, p. 8a). This error was one of fact and law, and it is of constitutional dimension.

As to the facts, the only "other" evidence which the Eighth Circuit deemed to be "adequate" to prove the value of 800 Coach 'N Six Court and hence support any conviction (*i.e.* that encumbrances far exceeded value) was a November 19, 1968 letter written by Mr. Anderson. (Gov't Exh. 32b; App. 4). The letter, while itself stating no value for 800 Coach 'N Six Court, enclosed a schedule to the investor (Rottmann) which, *inter alia,* referred to the "vacant lot" at 800 Coach 'N Six Court as having a $12,000 value. Evidently the Eighth Circuit believed that this was an admission by Mr. Anderson, and was therefore evidence, that the property was worth only $12,000 while the encumbrances thereon far exceeded that amount. The factual error is that 800 Coach 'N Six Court was *not* a "vacant lot" but was instead improved with a building not yet completed; hence, when Mr. Anderson referred to the *vacant lot* at 800 Coach 'N Six Court as having a value of $12,000, he was clearly not giving a value for that land with the improvements thereon, and since the value of the land and improvements thereon is the critical valuation under the indictment, this letter is not evidence of the revelant value.

It is also clear that the Government itself did not take Mr. Anderson's letter as an admission, and thus as evidence, of the value of 800 Coach 'N Six Court as improved. In his opening statement and closing

argument [Tr. 35-36, 545, 570-571], Government counsel referred to the "unfinished" or "incomplete building" on the land of 800 Coach 'N Six Court, and further stated that the property, as improved at the time of the November 19, 1968 letter, had a value of $29,000 to $30,000, figures which had absolutely no support in the evidence. It is ironic that the Eighth Circuit relied on evidence which the Government itself did not rely upon and with which it expressly disagreed.

In sum, there were three references to value in the record relating to 800 Coach 'N Six Court: (1) the admittedly inadmissible evidence of the tax assessment value ($16,325 for the year 1964—Tr. 430); (2) Mr. Anderson's November 19, 1968 letter attachment relating only to the value ($12,000) of the *vacant* land, not the land as *improved;* and (3) the prosecutor's gratuitous but unfounded references to a $29,000 to $30,000 value for that property as improved. When the assessor's inadmissible evidence is eliminated as it must be, the record is left with absolutely *no* evidence of the value of 800 Coach 'N Six Court as *improved;* hence, as the Eighth Circuit recognized, the absence of competent evidence of value compels an acquittal since, without such evidence, the Government would have failed to prove an essential element of the indictment, namely that the encumbrances far exceeded the value of the property. The Eighth Circuit's conclusion that there was other evidence to support the verdict is therefore plain and unequivocal error.

The net effect of the obvious error below is that two people, 64 years old and without criminal records, face ten year prison terms on a conviction based on *no* evidence as to an essential element of the crime as charged. To let the convictions stand, because of what

can be no more than an inadvertent oversight below, would work the most grievous of injustices.[3]

The Eighth Circuit also erred as a matter of law in the standard or test it used in affirming the convictions on Counts II and III. All it did was conclude, without citation or support, that Mr. Anderson's letter of November 19, 1968, was "adequate" evidence to support the verdict. (App. 1, p. 8a). As hereinafter discussed, the test is not whether there was "other evidence" *per se* "adequate" to support the verdict; instead the test is whether the constitutionally infirm evidence "might have contributed" to the guilty verdict, a far more stringent test which is not limited to an evaluation of the sufficiency of other properly admitted evidence (the "harmless error" rule), but requires an analysis of the effect of the constitutionally inadmissible evidence, *i.e.* whether it might have influenced the jury. Not only, therefore, has the Eighth Circuit, in using the harmless error rule, not followed the express directives of this Court as to the proper standard of review in such cases,[4] but had it given the scrutiny required by this Court, it could not help but have noticed that the assessor's inadmissible testimony was the only evidence of value as to the convictions which it incorrectly affirmed.

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[3] It should also be noted that the Government attempted to show the amount of the encumbrances on 800 Coach 'N Six Court, as of the relevant time, by evidence which was also inadmissible, namely a compilation by some unknown employee of a title company who prepared a schedule for some attorney not involved in this case. In view, however, of the clear error as to value, discussion as to the evidence of encumbrances, though material, is unnecessary.

[4] *Fahy* v. *Connecticut*, 375 U.S. 85 (1963); see also *Chapman* v. *California*, 386 U.S. 18 (1967) and *Kotteakos* v. *United States*, 328 U.S. 750 (1946). All are discussed *infra*.

Since the jury found petitioners guilty on nine counts where the assessor's testimony of value was found by the court below to be the only evidence of value, the jury must have been persuaded by that evidence. To conclude cavalierly that the appraiser's testimony, which the jury found to be determinative on nine counts, did not contribute to or determine the verdict on Counts II and III is totally unrealistic. If the petitioners' convictions are allowed to stand, it will have to be on the unquestionably erroneous assumption that there was some proper and competent evidence of the value of 800 Coach 'N Six Court and on the unquestionably erroneous assumption that the jury, convinced solely by the inadmissible evidence as to nine counts, was not affected or persuaded by the appraiser's testimony as to two counts.

It is not worthy of the federal system of criminal justice to let stand a conviction which can be explained only by blind adherence to two fictions.

REASONS FOR GRANTING THE WRIT

This case presents two elements which beg for relief by this Court. First, and peculiar to these petitioners alone, is that they are well along in years and, after many years of engaging in a perfectly legitimate business with no criminal background, they are suddenly faced with ten-year prison terms essentially because adverse economic conditions resulted in the bankruptcy of their corporations and their inability to pay their debts. Petitioners face a prolonged prison term because of a conviction based on no competent evidence on an essential element of the Government's case and because of the clear error on the part of the court below in reviewing the evidence upon

which they were convicted. While this regrettable injustice should alone justify review by this Court, the second element of the case is of far-reaching importance. By failing to recognize and apply the special standard required under the Constitution, by this Court's consistent decisions, and by decisions of other courts of appeals, the Court of Appeals for the Eighth Circuit has "decided a federal question in a way in conflict with applicable decisions of this court" and "in a way in conflict with the decision(s) of other court(s) of appeals on the same matter." Moreover, the admission into evidence and consideration by the jury of testimony in violation of petitioners' sixth amendment rights to confrontation "so far departed from the accepted and usual course of judicial proceedings" and the Court of Appeals' affirmance "so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Rule 19, Rules of the Supreme Court of the United States, *Considerations Governing Review on Certiorari.*

I. The Court Below Failed To Apply the Proper Standard of Review Where Constitutionally Inadmissible Evidence Was the Core of the Government Case.

The Court of Appeals in this case refused to follow the clear standards set forth in this Court's decisions in *Fahy, Chapman* and *Kotteakos, supra,* p. 9, fn. 4. Having found that crucial Government evidence was admitted over petitioners' strenuous objections and in violation of their sixth amendment right to be confronted with the witnesses against them, it was the duty of the Court of Appeals to apply the correct standard set forth in the prior decisions of this Court, and to determine whether that evidence (*i.e.* the assessor's

testimony as to the value of 800 Coach 'N Six Court as well as the other properties) "might have contributed" to the convictions of petitioners on the two counts left standing by the Court of Appeals. Rather than this test, required in any case where constitutionally inadmissible and prejudicial evidence has been permitted, the Court of Appeals applied the general "harmless error" standard, and applied it erroneously in finding "other evidence" to support convictions on two counts when such "other evidence" was incompetent and not even relied upon by the Government. The "harmless error" test has been specifically rejected by this Court in any case where prejudicial constitutional error contributed to the conviction.

In 1946, this Court, in *Kotteakos* v. *United States, supra,* refused to affirm conspiracy convictions on the basis of "harmless error," where there had been a proven violation of the petitioners' sixth amendment rights "to be informed of the nature and cause of the accusation." This Court held that the sixth amendment violation resulted in a high probability "that the error had substantial and injurious effect or influence in determining the jury's verdict" (328 U.S. at 776), and that it is not the proper method of review merely to affirm if the "conviction would, or might probably, have resulted in a properly conducted trial." The standard decreed in *Kotteakos* was whether the error could have contributed to the conviction; rejected was the standard of whether there could have been a conviction without the error.

In 1963, this Court, in *Fahy* v. *Connecticut, supra,* reversed a state court conviction wherein items seized in violation of the fourth amendment were admitted

into evidence. On review, this Court reiterated the standard set forth in *Kotteakos,* stating:

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. 375 U.S. at 86-87.

This Court then reviewed the facts of the case and the evidence adduced at trial and found that the unconstitutionally obtained evidence was incriminating (375 U.S. at 88-89), and that the evidence was instrumental in linking the accused to the crime charged. (375 U.S. at 89).

In 1967, this Court, in *Chapman* v. *California, supra,* reaffirmed the *Fahy* standard of review, stating:

> We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, [footnote omitted] it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our Fahy case. 386 U.S. at 24.

The court below concluded that the error it found was of constitutional magnitude. There is no reason for this Court to disagree with that conclusion.[5] It was

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[5] The United States Court of Appeals for the Fifth Circuit *en banc* in *United States* v. *Williams,* 447 F. 2d 1285 (September 16, 1971), was faced with an appeal from convictions under the mail

an error affecting a fundamental right just as was the violation of the sixth amendment in *Kotteakos*, and the magnitude and seriousness of the error are comparable to the errors found by this Court to be of constitutional magnitude in many other areas.[6]

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fraud statute wherein the crucial evidence was testimony by an expert as to the fair market value of certain properties. The appraiser's testimony was admitted over the same constitutional objections made by petitioners in this case; however, in affirming Williams' conviction the Fifth Circuit noted that there was no constitutional error in admitting the testimony because the expert had, himself, examined the properties and prepared the reports from which he testified. The court stated, however (447 F.2d 1290):

"Had the Government attempted to introduce the appraisal reports in evidence without calling the expert who had prepared them and offering an opportunity for cross-examination, then Williams' right of confrontation would have been infringed, but this is not the case at bar."

In the instant case, of course, the appraiser had not prepared the reports from which he testified and the persons who prepared them were not available for cross-examination. Accordingly, in decisions reached two weeks apart, the Eighth Circuit and the Fifth Circuit reached the same conclusion, that in a mail fraud case where proof of market value of real estate is an essential element of the Government's case, a defendant's sixth amendment right to confront the witnesses against him is violated by the introduction of appraisal testimony without presenting for cross-examination the persons who prepared the appraisal reports.

[6] In *Glasser* v. *United States*, 315 U. S. 60 (1942), a denial of counsel at trial was found to be of constitutional magnitude and this determination was carried forward in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and in *Hamilton* v. *Alabama*, 368 U. S. 52, 55 (1961), where there was a failure to provide counsel even before trial and this Court did not even "stop to determine whether prejudice resulted." In *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927), a trial judge's remuneration, based on a scheme giving him a financial interest in the result, required a reversal even when no particular prejudice was shown and where the defendant was clearly guilty. In *Sheppard* v. *Maxwell*, 384 U. S. 333, 351-352 (1966), a reversal was required due to exposure by publicity highly

The plain error in this case is the failure of the courts below to address themselves to the question of whether the constitutionally inadmissible evidence of the assessor's testimony might have contributed to the jury's verdict on Counts II and III [*Kotteakos* and *Fahy, supra*] or, in other words, whether the assessor's testimony can, beyond a reasonable doubt, be deemed harmless. *Chapman, supra.* There is only one answer to this question: it cannot be said, beyond a reasonable doubt, that the assessor's testimony did not contribute to the convictions on Counts II and III.

The indictment charged one overall scheme to defraud. The twelve counts of the indictment merely incorporated twelve separate mailings, with each mailing allegedly sent pursuant to, and as part of, the one overall scheme which was an integral part of each count of the indictment. To the extent the Government offered any evidence to prove a scheme as to one count, that evidence also indicated the existence of the same scheme for all counts, provided that the jury believed that the specific letter, identified in each of the

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adverse to the defendant, without the need for a showing that jurors would in fact be prejudiced. In *Bollenbach* v. *United States*, 326 U. S. 607, 614-615 (1946), a jury was instructed on an unconstitutional presumption requiring a reversal of the conviction even though there was ample evidence to sustain the verdict. In *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931), and *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942), reversals were required when the convictions "may" have rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the convictions could have been sustained. Finally, where purposeful discriminations in the selection of jurors has been shown there has never been a requirement that prejudice to the defendant be demonstrated. *Whitus* v. *Georgia*, 385 U. S. 545 (1967). These and other cases are catalogued in Mr. Justice Stewart's concurring opinion in *Chapman* v. *California*, *supra*, 386 U. S. at pp. 42-45.

twelve counts, had been mailed. Hence, when the assessor was improperly permitted to testify as to property values relative to the one overall scheme as incorporated in Counts IV through XII, that evidence, as the jury clearly believed, proved the existence of the one alleged scheme, not only for those nine counts but also for Counts II and III.

Clearly then, the assessor's testimony relative to the scheme (*i.e.* as to the value of the properties involved) in Counts IV through XII also had a direct effect on the jury's consideration in finding the existence of the same scheme incorporated into Counts II and III. Without more, the jury was persuaded by the assessor's testimony to convict under Counts IV through XII; obviously the jury was equally persuaded by the assessor's testimony to convict under Counts II and III. Regardless of how much "other evidence" there may have been to show value under Counts II and III, it cannot be said, beyond a reasonable doubt, that the assessor's testimony as to value did not contribute to the convictions under those two counts which the court below affirmed.

Had the Court below not ignored the tests prescribed by this Court and followed in other circuits,[7] the con-

[7] In *Rosenthall* v. *Henderson*, 389 F. 2d 514 (6th Cir. 1968), the court recognized and applied the special standard required: "The test is not whether there was sufficient evidence to convict without that which is challenged; the test is whether the evidence complained of might have contributed to the conviction." 389 F. 2d at 516. In *Dean* v. *Hocker*, 409 F. 2d 319 (9th Cir. 1969), the court found little doubt that the defendant was guilty and that the jury would have been mistaken if it had not convicted, but nevertheless the conviction was reversed because evidence had been admitted which had been illegally seized under the fourth amendment.

victions on Counts II and III would have been reversed. Instead, the court below chose to apply the common "harmless error" test and thus committed a fundamental error which deprived petitioners of the full effectiveness of their sixth amendment rights. Under the above noted decisions of this Court, that error requires reversal.

As hereafter stated, the error by the court below as to the proper constitutional standard of review is further compounded by the fact that there was *no* evidence of value as to 800 Coach 'N Six Court except that which was admittedly inadmissible. Hence, the petitioners' convictions have been affirmed even though there is no competent evidence to prove what the court below acknowledged to be an indispensible element of the crime charged—*i.e.* actual market value.

II. Even in Applying the "Harmless Error" Test, an Improper and Less Stringent Standard of Review, the Court Below Affirmed Petitioners' Convictions on Incompetent Evidence Not Relied Upon by the Government.

The Government in this case necessarily made a major issue of the actual market value of the six parcels of property involved. The value claimed by the Government was emphasized both in its opening statement and in its rebuttal closing argument. In the Government's opening statement and closing argument the value of 800 Coach 'N Six Court was stated to be $29,000 to $30,000, and the property was stated to be improved by an unfinished structure. The entire thrust of the opinion of the court below in affirming on Counts II and III was that there was adequate evidence that the encumbrances on 800 Coach 'N Six Court far exceeded the value of that property. However, the evidence of this essential element of the count—value—

consisted of the appraiser's testimony that in 1964 the property had a valuation for tax purposes of $16,325 (evidence which cannot now be considered because it was unconstitutionally admitted) and Mr. Anderson's 1968 letter attaching his "estimate" that the "vacant" property was worth $12,000. The Government's argumentative claim that the property was worth between $29,000 and $30,000 had no evidentiary support whatsoever. It was not even close to the inadmissible testimony of the Government's appraiser, and it was so far removed from the estimate in Mr. Anderson's letter that two things are clear: the Government placed no reliance whatsoever on Mr. Anderson's letter as constituting evidence of the fair market value of the parcel as improved; and the only real evidence of value concerning any of the parcels which the jury considered, or was asked to consider, was the unconstitutionally admitted testimony by the appraiser.

Even assuming that the Court of Appeals did not apply an improper standard of review, and accepting for purposes of argument the method of review chosen, the petitioners' convictions on Counts II and III are not supported by Mr. Anderson's letter since it did not state a value as to 800 Coach 'N Six Court as improved, as opposed to the land only. Hence, even under the "harmless error" rule this letter does not constitute competent and accurate evidence sufficient to affirm a judgment of conviction and five-year consecutive sentences on each of the two counts.

Unless a Writ of Certiorari is issued, a fundamental constitutional error in the courts below will be perpetuated, as will petitioners' convictions which were based on no evidence on an essential element of the charge. To preserve to them the full benefit of their

sixth amendment rights, petitioners ask this Court to exercise its powers of supervision over the administration of criminal justice in the federal courts and to correct a grave error committed contrary to the applicable decisions of this Court and other circuit courts of appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 22, 1971

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,655

UNITED STATES OF AMERICA, *Appellee*,

v.

CHARLES W. ANDERSON and ANITA ANDERSON, *Appellants*.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 30, 1971.]

Before VAN OOSTERHOUT, HEANEY and ROSS, Circuit Judges.

Ross, Circuit Judge.

This is an appeal from the conviction of Charles W. Anderson and his wife, Anita Anderson, on eleven counts of an indictment charging the Andersons with use of the mail for the purpose of executing a scheme to defraud under 18 U.S.C. § 1341. We affirm in part and reverse in part.

The Andersons owned and operated Real Estate Loan & Investment Co. and Chas. W. Anderson, Inc. in St. Louis, Missouri. These corporations sold to their customers, notes, mortgages, bonds, and deeds of trust executed by those companies and by W. Dohrman and H. Dohrman, relatives of the Andersons, which purported to convey to

the purchasers a security interest in various parcels of land in St. Louis. The Government alleged in the twelve count indictment that the Andersons, as a part of said scheme and artifice to defraud, "sold notes, mortgages, bonds and deeds of trust in amounts far in excess of the actual value of the properties held as securities therefor"; and made false representations "[t]hat the obligations being or to be purchased were first deeds of trust or secured by a first deed of trust, when in truth and in fact, said obligations were not so secured, as the defendants well know."[1]

In each count of the indictment, an allegation was made of the mailing of a different letter to a different person

[1] In addition to these allegations, the indictment alleged as to each count as follows:

> "That title certificates or letters of opinion as to titles to real estate supplied to the investors indicated the true ownership of the properties represented as securities for the notes, mortgages, bonds or deeds of trust and offered for sale to the investors, when in truth and in fact, said title certificates or letters of opinion were false, all of which the defendants well knew.
>
> "That the defendants would be and were acting as collecting agents of rents from the occupants of the properties which secured the obligations sold to the investors and which rental collections were being applied upon the payment of the outstanding obligations, when in truth and in fact the defendants were not so acting as collecting agents, all of which the defendants well knew.
>
> "That the obligors on financial obligations sold to the investors were making payments on principal and interest to the defendants to be applied on said obligations, when in truth and in fact, no payments were being made, all of which the defendants well knew.
>
> "The investors or purchasers of securities or obligations would receive interest at the rate of 6.5 to 7%, payable semi-annually, with the principal obligations maturing in three years, when in truth and in fact, no such interest or principal was being paid, all of which the defendants well knew."

for the purpose of executing the alleged scheme to defraud. Count I of the indictment was dismissed on the Government's motion. The eleven remaining counts related to notes secured by deeds of trust on six parcels of land.

On appeal, the Andersons claim: (1) that the trial court erred in overruling their motions to dismiss and to arrest judgment because the indictment failed to allege that the mailings were an essential part of the offense alleged and because it failed to allege facts to show that the mailings were within the class prohibited by the statute; that on trial, the proof did not establish beyond a reasonable doubt that the defendants defrauded those named in the indictment, and that the mailings were an essential part of the defrauding scheme; (2) that the court erred in admitting into evidence the testimony of John F. McDonald of the County Assessor's office as to the assessed value of these properties; (3) that the court erred in admitting into evidence "letter reports" from title companies purporting to show that the properties in question were encumbered by more than one deed of trust or that deeds of trust were not in fact first deeds of trust as alleged; (4) that the court erred in overruling the motions of the defendants for a bill of particulars; and (5) that the court erred in overruling the defendants' motion for a new trial.

I. Sufficiency of the Indictment

Rule 7c of the Federal Rules of Criminal Procedure requires that the indictment "be in a plain, concise and definite written statement of the essential facts constituting the offense charged." In *United States* v. *Debrow*, 346 U.S. 374, 376 (1953), recently quoted by this Court in *United States* v. *Edwards*, No. 20,327 (8th Cir. May 20, 1971), the Supreme Court said:

> "[a]n indictment is required to set forth the elements of the offense sought to be charged.
>
> 'The true test of the sufficiency of an indictment is not whether it could have been made more definite

and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayre* v. *United States,* 157 U.S. 286, 290; *Rosen* v. *United States,* 161 U.S. 29, 34; *Hagner* v. *United States,* 285 U.S. 427, 431."

In *Pereira* v. *United States,* 347 U.S. 1, 8 (1954), the Supreme Court determined that the essential elements of mail fraud were "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." The Court then said: "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." *Id.* Likewise, this Court said in *Gold* v. *United States,* 350 F.2d 953, 956 (8th Cir. 1965), that the essential elements of mail fraud were "a scheme conceived by appellant for the purpose of defrauding .... by means of false pretenses, representations or promises, and (2) use of the United States mails in furtherance of that scheme." *Britchard* v. *United States,* 386 F.2d 760, 764, (8th Cir. 1967), *cert. denied sub. nom Brochelt* v. *United States,* 390 U.S. 1004 (1968); *Fabian* v. *United States,* 358 F.2d 187, 193 (8th Cir.), *cert. denied,* 385 U.S. 821 (1966); *Atkinson* v. *United States,* 344 F.2d 97, 99 (8th Cir.), *cert. denied,* 382 U.S. 867 (1965). Measured by the above pronouncements of the law, the wording of the indictment is obviously sufficient. The indictment alleges that "Charles W. Anderson and Anita Anderson . . . did devise . . . a scheme . . . to defraud" and "for the purpose of executing the aforesaid scheme . . . did place and caused to be placed in an authorized depository for mail a letter. . . ."

Our conclusion is strengthened by the fact that the indictment substantially followed "Form 3, Indictment for

Mail Fraud" which is found in the Appendix of Forms attached to the Federal Rules of Criminal Procedure. *See United States* v. *Bagdasian,* 291 F.2d 163, 164-165 (4th Cir.), *cert. denied,* 368 U.S. 834 (1961); *Martin* v. *United States,* 285 F.2d 150, 151 (10th Cir. 1960), *cert. denied,* 365 U.S. 853 (1961).

It is well established that to be guilty of the crime contemplated by 18 U.S.C. § 1341, it is not necessary to prove that someone has actually been defrauded. *Pereira* v. *United States, supra,* at 8; *United States* v. *Gross,* 416 F.2d 1205, 1209 (8th Cir. 1969), *cert. denied,* 397 U.S. 1013 (1970); *New England Enterprises, Inc.* v. *United States,* 400 F.2d 58 (1st Cir. 1968); *cert. denied,* 393 U.S. 1036 (1969), and other cases cited therein; *Prichard* v. *United States, supra,* at 764.

The Andersons' contention that the mailings were not proved to be an essential part of the alleged defrauding scheme is not well taken. As stated in *Parr* v. *United States,* 363 U.S. 370, 390 (1960), "only if the mailings were 'a part of the execution of the fraud,' or, as we said in *Pereira* v. *United States,* 347 U.S. 1, 8, were 'incident to an essential part of the scheme,' do they fall within the ban of the federal mail fraud statute."

The mailing sent out on November 19, 1968, as alleged in Count II of the indictment, was sent to Ervin Rottmann in an effort to get him to invest money in notes secured by trust deeds to several properties, including 800 Coach 'N Six Court. The mailing sent out on December 22, 1964, as alleged in Count III of the indictment, was sent to Mrs. Mayme Schmidt enclosing "$3,000.00 of first deed of trust on #800 Coach 'N Six Court, dated December 12th, 1964, . . ." Mrs. Schmidt testified that she also received a title letter from the Andersons dated January 20, 1965, and purportedly written by "Land Title Insurance Company" which indicated that Chas. W. Anderson, Inc. had clear title to 800 Coach 'N Six Court, subject

to a single deed of trust in the sum of $9,500.00 recorded December 21, 1964. The evidence also established that this title letter was not prepared by Land Title Insurance Company. These mailings were clearly "incident to an essential part of the scheme." *Parr* v. *United States, supra,* at 390.

The allegation that the Government presented no evidence that the Andersons had any "intent to defraud" at the time the scheme was put into operation is also without merit. As this Court indicated in *Anderson* v. *United States,* 369 F.2d 11, 15 (8th Cir. 1966), *cert. denied,* 386 U.S. 976 (1967), a jury may consider in its determination of intent the totality of defendants' conduct while involved in their scheme. An examination of the record, as exemplified by but the few examples mentioned herein, compels the conclusion that there was substantial evidence from which intent to defraud could have been found.

II. Evidence of Value

The indictment alleges as to each count that as part of the scheme to defraud devised by the defendants, they sold to their customers notes and deeds of trust "in amounts far in excess of the actual value of properties held as securities therefor." They also alleged as to each count that the defendants knowingly made false representations that the value of the property used as security for the obligation to be purchased by the investor was far in excess of mortgages and liens against it. These allegations in the indictment made it incumbent upon the Government to prove the actual value of the six parcels of real estate involved in the eleven counts, and the amount of the encumbrances against them.

The Government offered the testimony of John F. McDonald, Chief Appraiser in the Department of Revenue in the Assessment Division of St. Louis County, as to the values placed upon each of these six parcels for tax assess-

ment purposes in St. Louis County. The Andersons claim that this evidence was inadmissible and failed to establish a proper basis for determining actual value of each parcel. We agree.

At the time he testified, McDonald had in his possession the official records of St. Louis County showing the appraised "market value" and "valuation for tax purposes" of each of the six parcels in question. The appraisals had been made by an independent appraisal firm under contract to the county and not by McDonald. The appraisals were made in 1958 (2 parcels), 1959, 1962, 1964 and 1966 (one parcel each year). The Government did not offer the records or copies thereof into evidence, but only offered the oral testimony of McDonald as to the contents of the records. Objections were timely made to the testimony and overruled. Oral testimony as to the contents of these records was hearsay, was not the best evidence, and was not admissible to prove the value of the parcels of real estate.

This Court said in *Murdock v. United States*, 160 F.2d 358, 361 (8th Cir. 1947), that "the valuation of property by tax assessors for tax purposes is not admissible to establish market value in condemnation proceedings . . .". This would be even more true in a criminal case where, as here, aside from being hearsay and not the best evidence, the testimony was given by a person who had not actually appraised the property in question. Thus depriving the defendants of their sixth amendment right to be confronted with the witnesses against them.

It is our conclusion that this evidence was inadmissible, and therefore not proof of the allegation of each of the eleven counts, that the market value of each of the six properties was far less than the outstanding deeds of trust. Since this was an essential element of the alleged scheme to defraud, the motion for judgment of acquittal made at the close of all the evidence should have been sustained as to all counts as to which this was the only evidence of value.

However, there is other evidence in the record which is adequate to prove that the market value of one property—800 Coach 'N Six Court—was far less than the mortgages and deeds of trust against it. This property is involved in Counts II and III of the indictment. The Government's exhibit 32B is a letter dated November 19, 1968, from Chas. W. Anderson, on behalf of Real Estate Loan & Investment Co. to Mr. Ervin Rottmann and was received in evidence without objection. In that letter, Mr. Anderson made the following statement:

> "We are enclosing with this letter a list of the loans held by the investor mentioned above. This list indicates the properties involved, the type of property, when the loans are due, the total amount of the deed of trust on each property, our estimate of the value of each property, and the amount of the participating notes held by the investor. These notes range from $1,000 to $5,000 each."

Attached to the lettter was a sheet showing that 800 Coach 'N Six Court was a vacnt lot having a value of $12,000.00 with $9,500.00 "Total Mortgage" against it.[2]

The Government also produced evidence, which was received without objection, in the form of bankruptcy schedules filed on behalf of Real Estate Loan & Investment Co. and signed by Anita Anderson which show that when the mailings alleged in Counts II and III were made, on December 22, 1964, and on November 19, 1968, there were notes secured by deeds of trust outstanding against 800 Coach 'N Six Court exceeding $75,000.00. A letter from General Title Service Corporation, dated November

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[2] This letter also contained an admission as to the value of 905 Surrey Lane. However, the discrepancy between its actual value and the total amount of the deeds of trust recorded against it is not, in this Court's opinion, "far in excess" of the property's actual value as alleged in the indictment.

19, 1968, Government's exhibit 96, showed that there were deeds of trust recorded against this property as follows:

Recording Date	Amount
October 4, 1961	$28,500.00
June 24, 1963	8,000.00
April 17, 1964	10,000.00
December 21, 1964	9,500.00
Total	$56,000.00

The title letter did not show the recording of a deed of trust on or about October 15, 1963, but the bankruptcy schedules reveal that on February 28, 1969, there were six creditors who held notes dated October 15, 1963, totaling $24,500.00, which were secured by a deed of trust on 800 Coach 'N Six Court. The record is clear that as of the date of the mailings in Counts II and III, the total amount of the outstanding deeds of trust issued by the Andersons on 800 Coach 'N Six Court was far in excess of its value. The testimony also showed that there was an uncompleted structure on this property and that no revenue was being derived from it.

The evidence apart from the assessor's testimony with respect to Count II and III is strong on the issue that outstanding trust deeds were issued far in excess of the value of the property. Under such circumstances, we are satisfied that the admission of the assessor's value with respect to the property involved in such counts is not prejudicial. With respect to the remaining counts, we feel the error in the admission of the assessor's testimony was prejudicial.

III. Title Letters

We will consider the contentions of the Andersons relating to the admissibility of title letters only as it relates to 800 Coach 'N Six Court in view of our holding in the preceding section.

Over objection, the district court admitted Government exhibit 96, a title letter on 800 Coach 'N Six Court from the General Title Service Corporation, under the Business Records Act, 28 U.S.C. § 1732. The Andersons contend (1) that exhibit 96 was inadmissible to establish that the instruments purchased by the investors were not first deeds of trust because it (a) did not qualify under the Business Act, (b) was not the best evidence, and (c) was opinion testimony, and (2) that, since exhibit 96 was so used, it was highly prejudicial, denying defendants a fair and impartial trial. With both of these contentions, we disagree.

Section 1732 has but two requirements. First, the record must have been made in the regular course of business; and second, the regular course of business must have been to make such records contemporaneously or within a reasonable time thereafter. The record discloses that both of these requirements were satisfied. Mr. Barnes, a title examiner for General Title Service Corporation, testified that the nature of their business was to prepare title letters after searching the county and court records. This testimony was confirmed by Mr. Janning, vice president and secretary of General Title Service Corporation, who testified that exhibit 96 was prepared in the regular and usual course of the business. The letter, which was prepared for an attorney not involved in this case, was properly admitted under the Business Record Act, and defendants' argument that exhibit 96 was not the best evidence is without merit. The best evidence rule does not apply to records admitted under the Business Records Act. *United States* v. *Vandersee*, 279 F.2d 176, 180 (3rd Cir. 1960); *United States* v. *Kimmel*, 274 F.2d 54, 57 (2nd Cir. 1960). Defendants' argument that Mr. Barnes' testimony is opinion since he did not prepare exhibit 96 is also without merit. One of the purposes of section 1732 was to eliminate the requirement that the entrant must appear to authenticate the record. *United States* v. *Re*, 336 F.2d 306, 314 (2nd Cir.), *cert. denied*, 379 U.S. 904 (1964).

Assuming arguendo, however, that exhibit 96 should not have been admitted into evidence, we conclude that such admission did not deny the Andersons a fair and impartial trial. Instead, since the record reveals an abundance of evidence, excluding exhibit 96, to support the conclusion that these investors did not purchase *first* deeds of trust, we believe that its use at most would be harmless error under Rule 52 (a) of the Federal Rules of Criminal Procedure. *See Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946); *Buie* v. *United States*, 420 F.2d 1207, 1210 (5th Cir. 1969), *cert. denied*, 398 U.S. 932 (1970).

It has heretofore been noted that the bankruptcy schedules filed by the Andersons showed that there were several trust deeds against 800 Coach 'N Six Court prior to the mailings in question and in a total amount far in excess of its market value. This in itself is sufficient corroboration of the information contained in exhibit 96.

We have considered the other points raised by the Andersons and have found them to be without merit, especially in view of the disposition we now make of this case.

For the reasons set forth above, we affirm the judgment of conviction as to Counts II and III of the indictment. As to Counts IV, V, VI, VII, VIII, IX, X, XI and XII, we reverse and remand for further proceedings consistent with the views expressed in this opinion.

A true copy.

Attest;

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1971

No. 20,655

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES W. ANDERSON and ANITA ANDERSON, *Appellants.*

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by the Court that the same be, and it is hereby, denied.

September 23, 1971

APPENDIX 3

Indictment

(Filed in U. S. District Court December 17, 1969)

The Grand Jury charges:

That on or about February 15, 1959, and continuing to January 17, 1969, within the Eastern District of Missouri, Eastern Division, and elsewhere, the defendants;

CHARLES W. ANDERSON
and
ANITA ANDERSON,

operating as Real Estate Loan and Investment Company, and as Chas. W. Anderson, Inc., did devise and intent to devise, a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises hereinafter more particularly set forth from the following persons:

Mr. Delbert Ellerman
Mr. Ervin Rottmann
Mrs. Mayme Schmidt
Mrs. Alice Molitor
Mr. R. L. Deason
Mr. H. Kehl
Mrs. Wm. P. Seidl
Mr. John S. Helmes
Mr. and Mrs. Charles Ellerman
Mrs. Joseph P. Bicunas
Mr. and Mrs. Fred Maslo
Mrs. Mary Deason

and other residents of the United States, who would and could be induced to invest money in notes, mortgages, bonds and deeds of trust or securities recommended by the defendants, or in, with or through one of the companies or corporations owned and controlled by the

defendants, which said scheme and artifice to defraud so devised and intended to be devised by the defendants was in substance as follows:

1. That at all times material hereto and as a part of said scheme and artifice to defraud, the defendants dominated, directed and controlled the affairs of the Real Estate Loan and Investment Company and Chas. W. Anderson, Inc.

2. That as a further part of said scheme and artifice to defraud, the defendants did offer for sale notes, mortgages, bonds, deeds of trust and other securities or obligations issued in the names of Real Estate Loan and Investment Company, Chas. W. Anderson, Inc., W. Dohrman, and H. Dohrman.

3. That in the issuance, sale, transfer and negotiation of notes, mortgages, bonds and deeds of trust, the defendants used the names of W. Dohrman and H. Dohrman, actual persons, who were agents or employees under the direction and control of the defendants, who acted by what is known in the real estate business as "straw parties".

4. That as a further part of said scheme and artifice to defraud, the defendants sold notes, mortgages, bonds and deeds of trust in amounts far in excess of the actual value of properties held as securities therefor.

5. That as a further part of said scheme and artifice to defraud, the defendants would and did by means of oral and written representations made for the purpose of inducing the persons to be defrauded to purchase notes, mortgages, bonds, deeds of trust or other obligations and for the further purpose of lulling said purchasers into a false sense of security, represent to the persons to be defrauded, well knowing that said representations would be and were false and fraudulent when made as follows, to wit:

(a) That the obligations being or to be purchased were first deeds of trust or secured by a first deed of trust,

when in truth and in fact, said obligations were not so secured, as the defendants well knew.

(b) That the value of the property or properties held as security for the obligation offered to or purchased by the investors were of a value far in excess of any outstanding loans, mortgages, liens or obligations, when in truth and in fact, the amount of the outstanding loans, mortgages, liens or obligations were far in excess of the actual cash value of the properties designated as security, all of which the defendants well knew.

(c) That title certificates or letters of opinion as to titles to real estate supplied to the investors indicated the true ownership of the properties represented as securities for the notes, mortgages, bonds or deeds of trust and offered for sale to the investors, when in truth and in fact, said title certificates or letters of opinion were false, all of which the defendants well knew.

(d) That the defendants would be and were acting as collecting agents of rents from the occupants of the properties which secured the obligations sold to the investors and which rental collections were being applied upon the payment of the outstanding obligations, when in truth and in fact the defendants were not so acting as collecting agents, all of which the defendants well knew.

(e) That the obligors on financial obligations sold to the investors were making payments on principal and interest to the defendants to be applied on said obligations, when in truth and in fact, no payments were being made, all of which the defendants well knew.

(f) That the investors or purchasers of securities or obligations would receive interest at the rate of 6.5 to 7%, payable semi-annually, with the principal obligations maturing in three years, when in truth and in fact, no such interest or principal was being paid, all of which the defendants well knew.

That on or about September 29, 1966, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter from Real Estate Loan and Investment Company, addressed to Mr. Delbert Ellerman, R. R. No. 1, Box 25, Foristell, Missouri 63348, to be sent and delivered by the Post Office Department of the United States.

SECOND COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or before November 19, 1968, the defendants, Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so did cause to be sent and delivered, according to the directions thereon, by the Post Office Department of the United States of America, a letter addressed to Mr. Ervin Rottmann, 1465 Twillman, St. Louis, Missouri 63138, within the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code.

THIRD COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about December 22, 1964, in that area consisting of the City of St. Louis and that portion of St.

Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mrs. Mayme Schmidt, 6001 North Pointe Blvd., St. Louis, Missouri 63147, to be sent and delivered by the Post Office Department of the United States.

FOURTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about March 15, 1968, the defendants, Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so did cause to be sent and delivered, according to the directions thereon, by the Post Office Department of the United States of America, a letter addressed to Mrs. Alice Molitor, Route No. 1, Box 64A, Foristel, Missouri, within the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code.

FIFTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or before the 9th day of July, 1965, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District

of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mr. R. L. Deason, Ina, Illinois, to be sent and delivered by the Post Office Department of the United States.

SIXTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about February 20, 1967, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mr. H. Kehl, 1869 Belleair Road, Clearwater, Florida 33516, to be sent and delivered by the Post Office Department of the United States.

SEVENTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about March 4, 1968, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post

Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mrs. Wm. P. Seidl, 819 Thatcher, St. Louis, Mo. 63135, to be sent and delivered by the Post Office Department of the United States.

EIGHTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about November 16, 1965, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mr. John S. Helmes, 5245 Davison Street, St. Louis, Missouri 63115, to be sent and delivered by the Post Office Department of the United States.

NINTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about February 7, 1967, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post

Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mr. and Mrs. Charles Ellerman, R. R. No. 1, Box 25 Foristell, Missouri 63348, to be sent and delivered by the Post Office Department of the United States.

TENTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about April 25, 1966, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mrs. Joseph P. Bicunas, 7206 Colgate Avenue, University City, Missouri 63130, to be sent and delivered by the Post Office Department of the United States.

ELEVENTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about May 6, 1966, in that area consisting of the City of St. Louis and that portion of St. Louis County,

Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mr. and Mrs. Fred Maslo, 6642 Marquette Avenue, St. Louis, Missouri 63139, to be sent and delivered by the Post Office Department of the United States.

TWELFTH COUNT

The Grand Jury realleges all of the allegations of Count I of this indictment, except those contained in the last paragraph thereof.

That on or about August 1, 1966, in that area consisting of the City of St. Louis and that portion of St. Louis County, Missouri served by the St. Louis, Missouri Post Office, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the said defendants Charles W. Anderson and Anita Anderson, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did place and cause to be placed in an authorized depository for mail matter, a letter from Real Estate Loan and Investment Company addressed to Mrs. Mary Deason, 204 Buchanan Street, Benton, Illinois 62812, to be sent and delivered by the Post Office Department of the United States.

A True Bill

/s/ EARL BULLINGTON
Foreman

/s/ DANIEL BARTLETT, JR.
United States Attorney

APPENDIX 4

Government's Exhibit 32b

November 19, 1968

Mr. Ervin Rottmann,
1465 Twillman,
St. Louis, Mo. 63138

Dear Mr. Rottmann:

As you know, for many years our company, and the Gerling Realty Company before us, have been making loans on real estate properties in the St. Louis area, and selling them in whole or in part to investors such as yourself. These loans have always been profitable for us until the last several years. And, they have always been good secure loans for our investors.

As you probably realize, it has always been our policy in the past to pay interest notes when they became due . . . . this we did whether we had collected the interest from the borrowers or not. Of course, in order to do this, it was necessary for us to maintain quite a large working fund for this purpose. Because of our continuing to pay these interest notes, as long as we could, whether we collected from the borrowers or not, we are now faced with the problem of having completely disbursed our working fund to our investors, and have not been able to replace it because so many of the borrowers are delinquent and have not paid us. At the present time, this delinquency on the part of the borrowers amounts to more than $75,000, which means that we have advanced that much to our investors without being able to collect it in return.

Because of this situation, we were faced with the decision of either changing our type of operation, or supplementing it with a different type of operation. We have decided to do both.

We are fortunate that, through the activities of an associate, an Attorney in St. Louis County, we will be

enabled to participate in the ownership and operation of a Real Estate Investment Trust. Through the operations of this Real Estate Investment Trust, we will have funds available to gradually pay off and pick up the principal and interest notes held by our investors on most of the properties which are owned by borrowers who are delinquent. We will then secure title to those properties, either through foreclosure or other means, and then rehabilitate the properties through funds of the Trust or through the F.H.A., by virtue of new legislation affecting F.H.A. Then those properties can be sold through F.H.A., on a 40-year term at low interest rates, if they are sold to colored owners. In this way we can phase out the colored loans and when our funds are replenished, can then make loans on white properties.

However, there is one blockade which stands in the way of our participating in this Trust and of consequently using the funds of that Trust to revamp our operations.

One of our investors, to whom we have advanced many dollars in payment of interest notes without as yet having been able to collect from the borrowers, has a few interest notes which have not been paid, and which we cannot pay at this time by advancing the interest payments because of the complete elimination of our working fund maintained for that purpose, has secured an Attorney to represent her. This Attorney has taken actions, which if permitted to continue, will definitely prevent us from participating in the operations of the Real Estate Investment Trust. If we are so prevented from such participation, of course, we will not have available the funds with which to pick up the various principal and interest notes which our other investors may want to dispose of.

This investor, mentioned above, has $17,500 worth of principal notes, being parts of nine different loans. It has been suggested to us that these notes could be picked up for $14,000, this being 80% of the face value of the notes,

and that delinquent interest would be waived. This means, that if we are able to pick up the $17,500 worth of notes from this client for the total amount of $14,000, we will then be able to dispose of the actions taken by that Attorney, and can then proceed to participate in the operation and benefits of the Real Estate Investment Trust and thereby secure the funds necessary for a complete elimination of the dissatisfactory loans.

We are enclosing with this letter a list of the loans held by the investor mentioned above. This list indicates the properties involved, the type of property, when the loans are due, the total amount of the deed of trust on each property, our estimate of the value of each property, and the amount of the participating notes held by the investor. These notes range from $1,000 to $5,000 each.

When we reached the position which we now find ourselves, we decided to call upon our loyal investors for help in survival. Therefore, we respectfully ask for YOUR help at this time. If it is at all possible, we would greatly appreciate your agreement to pick up all, or several, or even one of these notes. We will agree to buy back whatever notes you pick up, at the end of one year, at the face value of the note. For example, if you pick up one note with a face value of $1,000 it will be necessary for you to pay $800 for this note. We will give you a promissory note for the $1,000 due in one year, and will pay you 7% interest on the $1,000 for one years. All these notes are parts of regular deeds of trust, such as you have bought before.

We are also enclosing a statement indicating what would have to be paid for each amount of note (being 80% of the face value), the amount of premium that would be earned at the end of the year, the interest rate that would be earned on the note (which would be in addition to that which we would pay on our note to you).

In order to accomplish the removal of the Attorney, and the releasing of our operations so that we may be able to participate in the acquisition of the Real Estate Investment Trust, it is necessary that there be no delay in our actions; therefore, we ask for your kind consideration of this request in the form of a quick decision and action. If you would desire further details of these transactions, either Mrs. Anderson or I would be glad to sit down with you and answer whatever questions may arise on your part. If you desire us to do so, we would be glad to drop by and see you at your convenience and go into this further, if you can help us at this time, which we surely hope and trust you will. We can be reached at UN 7-6482.

If we are successful in having all these notes picked up, then the Trust would be available to us, and through the use of its funds we will, of course, be glad to take off your hands any notes which you may want to dispose of, at their face value.

Hoping that we may quickly have your affirmative answer to this request for help, we remain with kindest personal regards,

Respectfully yours,

CHAS. W. ANDERSON

for Real Estate Loan & Inv. Co.
St. Louis, Mo.

Location	Collateral	Date Due	Total Mortgages	Loan Amount	Valuation	Int. Rate
5736 Kennerly Ave.	Residence	3/ 9/71	$ 5,000	$ 2,500	$ 9,500	6.5%
639 Robert Ave.	Residence	1/ 4/71	8,500	1,000	13,900	6.6%
3101-03-05 N. Jefferson Ave.	Commercial & Resid.	5/ 2/69	12,000	1,000	19,000	6.6%
6422 Myrtle Ave.	Residence	6/12/71	5,000	1,000	8,500	6.5%
4269 St. Louis Ave.	Commercial & Resid.	2/10/71	7,500	1,000	11,000	6.5%
800 Coach n[illegible]Six Court	Vacant lot	12/12/70	9,500	3,000	12,000	6.6%
9816 Surrey Lane	Residence	11/15/68	29,500	1,000	37,500	6.5%
Lot 2, Blk 2 Cool Valley Hls.	Vacant lot	1/14/69	10,000	2,000	12,000	8%
985[illegible] Surrey Lane	Residence	5/26/69	22,000	5,000	[illegible]	6.5%
	Total			$17,500		

Amount of Principal Note, and to be repaid at end of one year	$1,000	$2,000	$2,500	$3,000	$5,000
Amount at which above note can be bought	800	1,600	2,000	2,400	4,000
Premium Earned at end of one year	200	400	500	600	1,000
Interest Earned for one year loan	56	112	140	168	280
Total Earnings for one year, Premium & Interest	$ 256	$ 512	$ 640	$ 768	$1,280
Percentage of Return for one year 32%					

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In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES W. ANDERSON and ANITA ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.